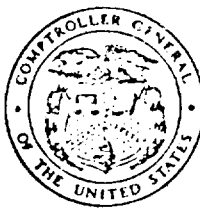


**DECISION**

*J J PLM2*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE:** B-210916**DATE:** May 20, 1983**MATTER OF:** Federal Aviation Academy Instructors**DIGEST:**

Section 145 of Public Law 97-377, December 21, 1982, which amends 5 U.S.C. § 5546a(a) to provide that certain instructors at the Federal Aviation Academy are entitled to premium pay, is effective from the date of enactment and is not retroactive to August 3, 1981, as were the original provisions of 5 U.S.C. § 5546a(a) added by subsection 151(a) of Public Law 97-276. The general rule is that an amendatory statute is applied prospectively only unless a retroactive construction is required by express language or by necessary implication. Neither the express language nor the legislative history support the view that the amendment made by section 145 is retroactively effective.

This is in response to a request for an advance decision by the Director of Personnel and Training of the Federal Aviation Administration, Department of Transportation, as to whether instructors at the Federal Aviation Academy in Oklahoma City, Oklahoma, are entitled to premium pay retroactive to August 3, 1981. The question arises in view of the premium pay provisions (5 U.S.C. § 5546a) added by section 151 of Public Law 97-276, October 2, 1982, 96 Stat. 1186, 1200, as amended by section 145 of Public Law 97-377, December 21, 1982, 96 Stat. 1830, 1917. As explained below, we find that the effective date of the instructors' entitlement to the premium pay involved is not earlier than December 21, 1982, the date of passage of the amendment which included Federal Aviation Academy instructors under the coverage of the premium pay provision set forth at 5 U.S.C. § 5546a(a). The statutory language does not provide that the instructors' entitlement to premium pay under 5 U.S.C. § 5546a(a) was to be retroactively effective nor does the legislative history clearly indicate that such entitlement was meant to be retroactive.

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Subsection 151(c) of Public Law 97-276\* amended Chapter 55 of title 5, United States Code, by adding the following provision for premium pay for certain employees of the Federal Aviation Administration:

**"§ 5546a. Differential pay for certain employees of the Federal Aviation Administration**

"(a) The Administrator of the Federal Aviation Administration (hereafter in this section referred to as the 'Administrator') may pay premium pay at the rate of 5 per centum of the applicable rate of basic pay to--

"(1) any employee of the Federal Aviation Administration who is--

"(A) occupying a position in the air traffic controller series classified not lower than GS-9 and located in an air traffic control center or terminal or in a flight service station;

"(B) assigned to a position classified not lower than GS-09 or WG-10 located in an airway facilities sector; or

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\*The provision in Public Law 97-276, Continuing Appropriations for Fiscal Year 1983, relating to the compensation of certain employees of the Federal Aviation Administration is erroneously set out as Section 151 rather than Section 152. Section 151 follows another Section 151 which pertains to appropriations to the National Endowment for the Humanities. The express language of several subsections of Section 151 as well as its legislative history clearly show that such section was intended to be enacted as Section 152 of Public Law 97-276.

"(C) assigned to a flight inspection crew-member position classified not lower than GS-11 located in a flight inspection field office,

the duties of whose position are determined by the Administrator to be directly involved in or responsible for the operation and maintenance of the air traffic control system; and

"(2) any employee of the Federal Aviation Administration who is assigned to a flight test pilot position classified not lower than GS-12 located in a region or center, the duties of whose position are determined by the Administrator to be unusually taxing, physically or mentally, and to be critical to the advancement of aviation safety.

"(b) The premium pay payable under any subsection of this section is in addition to basic pay and to premium pay payable under any other subsection of this section and any other provision of this subchapter."

With regard to the effective date of 5 U.S.C. § 5546a, added by subsection 151(c), subsection 151(h)(1) of Public Law 97-276 provided as follows:

"(h)(1) The amendments made by subsections 152(b), (c), (e), and (g) of this joint resolution shall take effect at 5 o'clock ante meridian eastern daylight time, August 3, 1981."

Thus, the employees covered by 5 U.S.C. § 5546a(a) as added by subsection 151(c) of Public Law 97-276 are entitled to the payment of premium pay thereunder retroactive to August 3, 1981. However, at the time it was first enacted, section 5546a(a) did not include employees occupying positions as instructors at the Federal Aviation Administration Academy.

The legislative history of section 151 shows that it was enacted in part to fulfill for the air traffic controllers who continued to work after the strike against the Federal Government on August 3, 1981, the administration's prior commitment to propose legislation to increase controller benefits. See S. Rept. No. 97-581, 97th Cong. 2d Sess. 20-21.

Section 145 of Public Law 97-377, December 21, 1982, Continuing Appropriations for Fiscal Year 1983, amended 5 U.S.C. § 5546a(a) to include premium pay for Academy instructors by adding immediately after paragraph (2) the following:

"(3) any employee of the Federal Aviation Administration who occupies a position at the Federal Aviation Administration Academy, Oklahoma City, Oklahoma, the duties of which are determined by the Administrator to require the individual to be actively engaged in or directly responsible for training employees to perform the duties of a position described in \* \* \* paragraph (1) of this subsection, and who, immediately prior to assuming such position at such Academy occupied a position referred to in \* \* \* paragraph (1) of this subsection."

Thus, under 5 U.S.C. § 5546a(a) as amended by section 145 of Public Law 97-377, an instructor at the Federal Aviation Administration Academy in Oklahoma City is entitled to premium pay provided that he meets the conditions set forth therein.

The Federal Aviation Administration has advised us in its submission that its analysis is that the entitlement to premium pay for Academy instructors added by section 145 of Public Law 97-377 is not retroactive but only operates prospectively from the date of enactment of Public Law 97-377. That is because the provision for retroactive application contained in subsection 151(h)(1) of Public Law 97-276 only applied to amendments made by subsections 151(b), (c), (e), and (g) of Public Law 97-276.

The general rule is that an amendatory statute will be applied prospectively and not retroactively unless a retroactive construction is required by express language or by necessary implication. 16 Comp. Gen. 1051 (1937), 26 Comp. Gen. 592 (1947), and 29 Comp. Gen. 11 (1949).

There is nothing in the language of either section 145 or any other section of Public Law 97-377 which provides that the amendment made by section 145 is to be effective on a retroactive basis. Neither is there any language in 5 U.S.C. § 5546a(a) as added by section 151 of Public Law 97-276 which would indicate that subsequent amendments thereto are to be retroactively effective. In addition, an examination of the legislative history of section 145 does not establish the existence of a legislative intent that the amendment made by section 145 was to be retroactively effective on the same basis as 5 U.S.C. § 5546a(a) as added by subsection 151(c) of Public Law 97-276. The statement of the Conference Committee on the amendment which was enacted as section 145 shows that the purpose of the section was to correct the inequity to instructors at the Academy which occurred because they were not entitled to premium pay. However, we found nothing there that would indicate that the entitlement of instructors to premium pay under 5 U.S.C. § 5546a(a) was to be retroactively effective. The report indicates that the amendment was in part intended to resolve possible difficulties in the future recruitment of instructors for the Academy. It states in part:

"The conferees have agreed to this provision in order to correct an inequity which arose upon the enactment of legislation to increase the compensation of air traffic controllers and related personnel in October. Under that legislation, instructors at the FAA Academy in Oklahoma City who train individuals to perform air traffic control, airway facilities, and flight inspection functions which would qualify for premium pay, would not themselves be entitled to premium pay. This section permits these instructors and their immediate supervisors to receive this premium pay.

"Without this expansion of coverage, recruitment of instructors for the Academy could be hampered, because people in operational positions covered by premium pay would not want to accept a position at the Academy which would require giving up those benefits. The new provision requires that, in order to be eligible for premium pay, a person must have occupied a position in the field which would have been covered by premium pay immediately prior to accepting a position as an instructor in the Academy.

"The conferees expect the Administrator to make the necessary coverage determinations as soon as practicable in order that these pay raises may become available as soon as possible."

H.R. Rep. No. 97-980, 97th Cong. 2d Sess. 197 (1982).

The remaining legislative history of section 145 consists of statements on the floor of the Senate by Senator Boren, the sponsor of the unprinted amendment number 1490 which as amended, was enacted as section 145 of Public Law 97-377, and by Senator Andrews (the Chairman of the Subcommittee on Transportation, Senate Committee on Appropriations). See 128 Cong. Rec 15098 (daily ed. December 16, 1982). In part, Senator Andrews stated that he shared Senator Boren's concern that all those Federal Aviation Administration employees who contributed to the strike recovery should be treated fairly and equally and concluded in his remarks as follows:

"\* \* \* It is an amendment that simply extends to those air traffic controllers, who were temporarily assigned as instructors at the Air Controller Training Academy the same bonus benefits and salary as received by the other air traffic controllers who stayed on the job during the recent emergencies, to make sure all these air traffic controllers who stayed on the job are treated alike."

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We are unable to view the above remarks on the intended equality of the treatment of Academy instructors as sufficient to demonstrate a legislative intent that the amendment made by section 145 of Public Law 97-377 would operate to provide entitlement to premium pay on a retroactive as well as a prospective basis. In the absence of express language or a clear implication in the statute that section 145 was to be retroactively effective, we must agree with the Federal Aviation Administration that the Academy instructors' entitlement to premium pay under 5 U.S.C. § 5546a(a) is prospective only, from the date of enactment of Public Law 97-377, December 21, 1982.

*for* *Harry R. Van Clive*  
Comptroller General  
of the United States

